identifying data deleted to
prevent clearly unwarranted
invasion of personal privacy

U.S. Department of Homeland Security
20 Mass. Ave., N.W., Rm. 3000
Washington, DC 20529

U.S. Citizenship
and Immigration
Services

B5

PUBLIC COPY

[redacted]

FILE: [redacted] Office: VERMONT SERVICE CENTER Date: DEC 2 8 2006
EAC 05 001 52944

IN RE: Petitioner:
Beneficiary: [redacted]

PETITION: Immigrant Petition for Alien Worker as a Member of the Professions Holding an Advanced Degree or an Alien of Exceptional Ability Pursuant to Section 203(b)(2) of the Immigration and Nationality Act, 8 U.S.C. § 1153(b)(2)

ON BEHALF OF PETITIONER:

[redacted]

INSTRUCTIONS:

This is the decision of the Administrative Appeals Office in your case. All documents have been returned to the office that originally decided your case. Any further inquiry must be made to that office.

Robert P. Wiemann, Chief
Administrative Appeals Office

DISCUSSION: The preference visa petition was denied by the Director, Vermont Service Center, and is now before the Administrative Appeals Office (AAO) on appeal. The appeal will be dismissed.

The petitioner is a software development company. It seeks to employ the beneficiary permanently in the United States as a chief, computer programmer pursuant to section 203(b)(2) of the Immigration and Nationality Act (the Act), 8 U.S.C. § 1153(b)(2). In pertinent part, section 203(b)(2) of the Act provides immigrant classification to members of the professions holding advanced degrees or their equivalent and whose services are sought by an employer in the United States. As required by statute, the petition was accompanied by certification from the Department of Labor. The director determined that the petitioner had not established that it had the continuing ability to pay the beneficiary the proffered wage beginning on the priority date of the visa petition or that the beneficiary had the necessary experience as of the priority date.

We will evaluate the evidence submitted below, which we find to be insufficient on its face for the reasons discussed below. The following discrepancies between the initial evidence and the evidence submitted on appeal, however, bear mention. First, the bank statements submitted on appeal reveal far more cash than listed by the petitioner on its tax returns, Schedule L. Second, the petitioner submits an employment letter on appeal for employment not previously claimed by the beneficiary. The petitioner makes no attempt to resolve or even explain these discrepancies.

It is incumbent upon the petitioner to resolve any inconsistencies in the record by independent objective evidence. Any attempt to explain or reconcile such inconsistencies will not suffice unless the petitioner submits competent objective evidence pointing to where the truth lies. *Matter of Ho*, 19 I&N Dec. 582, 591-92 (BIA 1988). Further, doubt cast on any aspect of the petitioner's proof may, of course, lead to a reevaluation of the reliability and sufficiency of the remaining evidence offered in support of the visa petition. *Id.* **The record does not resolve the above discrepancies. As such, the remaining evidence has limited** evidentiary value.

Ability to Pay

The regulation at 8 C.F.R. § 204.5(g)(2) states, in pertinent part:

> *Ability of prospective employer to pay wage.* Any petition filed by or for an employment-based immigrant which requires an offer of employment must be accompanied by evidence that the prospective United States employer has the ability to pay the proffered wage. The petitioner must demonstrate this ability at the time the priority date is established and continuing until the beneficiary obtains lawful permanent residence. Evidence of this ability shall be in the form of copies of annual reports, federal tax returns, or audited financial statements.

The petitioner must demonstrate the continuing ability to pay the proffered wage beginning on the priority date, the day the Form ETA 750 was accepted for processing by any office within the employment system of the Department of Labor. *See* 8 C.F.R. § 204.5(d). Here, the Form ETA 750 was accepted for processing on July 30, 2001. The proffered wage as stated on the Form ETA 750 is $46.50 per hour, which amounts to $96,720 annually. On the Form ETA 750B, signed by the beneficiary, the beneficiary claimed to have worked for the petitioner as of May 2004.

On the petition, the petitioner claimed to have been established in 1995, to have a gross annual income of $1.10 million, and to currently employ 19 workers. The petitioner did not supply its net annual income.

In support of the petition, the petitioner submitted its Internal Revenue Service (IRS) Form 1120S U.S. income tax returns for an S corporation for 2001, 2002 and 2003. The tax returns reflect the following information for the following years:

	2001	2002	2003
Net income	$144,348	($27,826)	$16,388
Current Assets	$76,391	$27,493	$8,612
Current Liabilities	$0	$0	$3,014
Net current assets	$76,391	$27,493	$5,598

The director determined that the evidence submitted did not establish that the petitioner had the continuing ability to pay the proffered wage after 2001, and, on February 28, 2005, denied the petition.

On appeal, the petitioner submits bank account statements for 2002 and 2003, the personal tax returns of the petitioner's sole shareholder, the beneficiary's Form W-2 for 2004 and the petitioner's tax return for 2004. The documentation for 2004, reflecting wages of $52,999.96 paid to the beneficiary and the petitioner's net income of $49,026 for that year satisfactorily establish the petitioner's ability to pay the proffered wage in 2004. At issue, then is the petitioner's ability to pay the proffered wage in 2002 and 2003.

Counsel's reliance on the balances in the petitioner's bank account is misplaced. First, bank statements are not among the three types of evidence, enumerated in 8 C.F.R. § 204.5(g)(2), required to illustrate a petitioner's ability to pay a proffered wage. While this regulation allows additional material "in appropriate cases," the petitioner in this case has not demonstrated why the documentation specified at 8 C.F.R. § 204.5(g)(2) is inapplicable or otherwise paints an inaccurate financial picture of the petitioner. Second, bank statements show the amount in an account on a given date, and cannot show the sustainable ability to pay a proffered wage. Third, no evidence was submitted to demonstrate that the funds reported on the petitioner's bank statements somehow reflect additional available funds that were not reflected on its tax return, such as the cash specified on Schedule L, already considered in determining the petitioner's net current assets.[1]

Counsel's reliance on the assets of the petitioner's shareholder is not persuasive. A corporation is a separate and distinct legal entity from its owners or stockholders. *See Matter of Tessel*, 17 I&N Dec. 631 (Act. Assoc. Comm. 1980); *Matter of Aphrodite Investments Limited*, 17 I&N Dec. 530 (Comm. 1980); *Matter of M-*, 8 I&N Dec. 24 (BIA 1958; A.G. 1958). Even when the corporation is organized as a Chapter S corporation for tax purposes, Citizenship and Immigration Services (CIS) will not consider the financial resources of individuals or entities who have no legal obligation to pay the wage. *See Sitar Restaurant v. Ashcroft,* 2003 WL 22203713, *3 (D. Mass. Sept. 18, 2003).

Once the proper initial documentation has been submitted, CIS will first examine whether the petitioner employed and paid the beneficiary during that period. If the petitioner establishes by documentary evidence that it employed the beneficiary at a salary equal to or greater than the proffered wage, the evidence will be

[1] While the balances in the petitioner's bank accounts, $34,859.04 as of December 31, 2002 and $62,768.78 as of December 31, 2003, are far greater than the cash reflected on the Schedules L, the record contains no explanation for this inconsistency. As such, the credibility of the tax returns themselves are somewhat diminished and we cannot rely on the lack of current liabilities.

considered *prima facie* proof of the petitioner's ability to pay the proffered wage. In the instant case, the petitioner did not establish that it employed and paid the beneficiary any wages in 2002 or 2003.

If the petitioner does not establish that it employed and paid the beneficiary an amount at least equal to the proffered wage during that period, CIS will next examine the net income figure reflected on the petitioner's federal income tax return, without consideration of depreciation or other expenses. Reliance on federal income tax returns as a basis for determining a petitioner's ability to pay the proffered wage is well established by judicial precedent. *Elatos Restaurant Corp. v. Sava*, 632 F. Supp. 1049, 1054 (S.D.N.Y. 1986) (citing *Tongatapu Woodcraft Hawaii, Ltd. v. Feldman*, 736 F.2d 1305 (9th Cir. 1984)); *see also Chi-Feng Chang v. Thornburgh*, 719 F. Supp. 532 (N.D. Texas 1989); *K.C.P. Food Co., Inc. v. Sava*, 623 F. Supp. 1080 (S.D.N.Y. 1985); *Ubeda v. Palmer*, 539 F. Supp. 647 (N.D. Ill. 1982), *aff'd*, 703 F.2d 571 (7th Cir. 1983). Showing that the petitioner's gross receipts exceeded the proffered wage is insufficient. Similarly, showing that the petitioner paid wages in excess of the proffered wage is insufficient. In *K.C.P. Food Co., Inc. v. Sava*, 623 F. Supp. at 1084, the court held that the Immigration and Naturalization Service, now CIS, had properly relied on the petitioner's net income figure, as stated on the petitioner's corporate income tax returns, rather than the petitioner's gross income. The court specifically rejected the argument that the Service should have considered income before expenses were paid rather than net income.

Nevertheless, the petitioner's net income is not the only statistic that can be used to demonstrate a petitioner's ability to pay a proffered wage. If the net income the petitioner demonstrates it had available during that period, if any, added to the wages paid to the beneficiary during the period, if any, do not equal the amount of the proffered wage or more, CIS will review the petitioner's assets. We reject, however, any argument that the petitioner's total assets should have been considered in the determination of the ability to pay the proffered wage. The petitioner's total assets include depreciable assets that the petitioner uses in its business. Those depreciable assets will not be converted to cash during the ordinary course of business and will not, therefore, become funds available to pay the proffered wage. Further, the petitioner's total assets must be balanced by the petitioner's liabilities. Otherwise, they cannot properly be considered in the determination of the petitioner's ability to pay the proffered wage. Rather, CIS will consider *net current assets* as an alternative method of demonstrating the ability to pay the proffered wage.

Net current assets are the difference between the petitioner's current assets and current liabilities.[2] A corporation's year-end current assets are shown on Schedule L, lines 1(d) through 6(d). Its year-end current liabilities are shown on lines 16(d) through 18(d). If a corporation's end-of-year net current assets are equal to or greater than the proffered wage, the petitioner is expected to be able to pay the proffered wage out of those net current assets.

The petitioner has not demonstrated that it paid any wages to the beneficiary during 2002 or 2003. In 2002, the petitioner shows a net loss and in 2003 it shows a net income of only $16,388. The petitioner shows net current assets of only $27,493 in 2002 and $5,598 in 2003. The petitioner has not, therefore, demonstrated the ability to pay the proffered wage out of its net income or net current assets. The petitioner has not demonstrated that any other funds were available to pay the proffered wage. The petitioner has not, therefore, shown the ability to pay the proffered wage during 2002 or 2003.

---

[2] According to *Barron's Dictionary of Accounting Terms* 117 (3rd ed. 2000), "current assets" consist of items having (in most cases) a life of one year or less, such as cash, marketable securities, inventory and prepaid expenses. "Current liabilities" are obligations payable (in most cases) within one year, such accounts payable, short-term notes payable, and accrued expenses (such as taxes and salaries). *Id.* at 118.

The petitioner failed to submit evidence sufficient to demonstrate that it had the ability to pay the proffered wage during 2002 or 2003. Therefore, the petitioner has not established that it had the continuing ability to pay the proffered wage beginning on the priority date. Moreover, the petitioner has filed two additional Form I-140 petitions, with priority dates in 2001 and 2002, both of which have been approved. The petitioner must demonstrate an ability to pay the proffered wage of all beneficiaries. Finally, we note that the petitioner has filed numerous nonimmigrant petitions as well.

The Beneficiary's Experience

To determine whether a beneficiary is eligible for a second preference immigrant visa, CIS must ascertain whether the alien is, in fact, qualified for the certified job. CIS will not accept a degree equivalency or an unrelated degree when a labor certification plainly and expressly requires a candidate with a specific degree. In evaluating the beneficiary's qualifications, CIS must look to the job offer portion of the labor certification to determine the required qualifications for the position. CIS may not ignore a term of the labor certification, nor may it impose additional requirements. *See Matter of Silver Dragon Chinese Restaurant*, 19 I&N Dec. 401, 406 (Comm. 1986). *See also, Mandany v. Smith*, 696 F.2d 1008, (D.C. Cir. 1983); *K.R.K. Irvine, Inc. v. Landon*, 699 F.2d 1006 (9th Cir. 1983); *Stewart Infra-Red Commissary of Massachusetts, Inc. v. Coomey*, 661 F.2d 1 (1st Cir. 1981). Moreover, the petitioner must demonstrate that the beneficiary was qualified as of the priority date of the petition. *See* 8 C.F.R. § 103.2(b)(12); *Matter of Katigbak*, 14 I&N Dec. 45, 49 (Reg. Comm. 1971).

As stated above, the priority date for the petition is July 30, 2001. On the ETA 750B, signed by the beneficiary, the beneficiary indicated software engineering and analyst experience from August 1996 through the present. The petitioner submitted employment letters supporting those claims beginning August 19, 1996.

The director concluded that the beneficiary did not have five years of experience as of July 30, 2001. On appeal, the petitioner submits a letter dated March 8, 2005 from [redacted] Headmaster of E. R. Higher Secondary School in Tiruchirappalli asserting that the beneficiary developed and designed payroll software for the school. Mr. [redacted] asserts that the project lasted from June 1, 1996 to August 1, 1996. Mr [redacted] concludes: "We have learnt that [the beneficiary] worked on the project for us about 12 to 14 hours daily in order for him to deliver it to us in the two month deadline we had assigned."

The petitioner provides no explanation for why the beneficiary failed to list this experience previously on the Form ETA 750B or why the petitioner did not initially document this employment. Moreover, the content of the letter is questionable. Mr. [redacted] does not explain how he "learnt" that the beneficiary worked 12 to 14 hours per day over two months developing the software. Thus, we cannot conclude that this letter establishes an additional two months of employment experience.

The burden of proof in these proceedings rests solely with the petitioner. Section 291 of the Act, 8 U.S.C. § 1361. The petitioner has not met that burden.

ORDER: The appeal is dismissed.